JD–64–06
Washington, DC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMERICAN POSTAL WORKERS UNION

and Case 9–CA–41337

CHERYL ALVES, An Individual

Julius Emetu, Esq., for the General Counsel.
Darryl J. Anderson, Esq., of Washington, DC,
for the Charging Party.

DECISION

Statement of the Case

RICHARD A. SCULLY, Administrative Law Judge. Upon a charge filed on August 13, 2004,[1] by Cheryl Alves, an individual, the Regional Director, Region 9, National Labor Relations Board (the Board), issued a complaint on April 28, 2006, alleging that the Respondent, American Postal Workers Union, had committed certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended (the Act) when its executive vice-president Cliff Guffey threatened and disciplined employees for engaging in activities protected by the Act. The Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Dayton, Ohio, on June 8, 2006, at which all parties were given a full opportunity to examine and cross-examine witnesses and to present other evidence and argument. Briefs submitted on behalf of the parties have been given due consideration. Upon the entire record, including my observation of the demeanor of the witnesses, I make the following

Findings of Fact

I. Jurisdiction

The Respondent is a labor organization, an unincorporated association with its national headquarters in Washington, DC. It has 5 regional offices and 18 national business agent offices located in various cities, including Dayton, Ohio, where it represents employees in bargaining with employers throughout the United States. During the 12-month period preceding April 28, 2006, in the conduct of it business operations, the Respondent collected and received dues and initiation fees in excess of $500,000, from its various offices which were remitted in interstate commerce to it national headquarters. The Respondent admits, and I find, that at all times material it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Amended charges were filed on November 1, 2004, and on April 20, 2006.

II. The Alleged Unfair Labor Practices

Prior to February 2004,[2] the Respondent began upgrading the computers at its headquarters and field offices. It purchased IBM desktop computers and for the headquarters computers, it separately purchased 60 thin flat screen LCD monitors . A recent renovation of its headquarters building had resulted in many of the secretaries employed there having the size of their work areas reduced and Guffey had decided to provide them with monitors which took up less space. In order to reduce costs, he also decided to send the headquarters CRT monitors, which were about a year and a half old, to the field offices rather than purchase new monitors for them.

Several of the secretaries in the field offices, including the Charging Party Cheryl Alves, believed that they were to get new thin LCD monitors with the new computers. When they heard rumors that this might not be the case and that they would be getting used CRT monitors from headquarters, they became upset and discussed the matter with one another by email using a system called "Groupwise" and by telephone. The secretaries are represented by OPEIU Local 2 and Alves placed a call to staff representative George Carbonoski to see if he could find out what was going on but Carbonoski did not return her call. On February 17, an email from Union official Omar Gonzales was circulated among the field office secretaries which confirmed that they would not be getting new LCD monitors. After receiving this news, a number of emails discussing the used monitors were sent back and forth among the field office secretaries on February 17.

The secretaries also made their displeasure known to Roger Cronk who is the senior manager of the Respondent's IT department by sending him copies of some of their emails. Cronk advised Guffey that he was getting "some flack" about the computer monitors and Guffey directed him to send out an email explaining that it was Guffey's decision to send the used monitors to the field offices. On February 18, Cronk sent an email to all of the field secretaries explaining how the computers were being upgraded and why the used monitors were being sent to the field offices and stating that it was Guffey's decision to do so. This resulted in emails being sent to Cronk by a number of the field office secretaries, with copies also going to Guffey. Several of these emails expressed disbelief of Cronk's explanation and/or included derisive comments. Guffey testified that on the evening of February 18, he read these emails, which were addressed to Cronk with copies to Guffey, and considered them disrespectful and offensive in that they said or implied that Cronk had not told the truth about the computer monitors. Guffey decided to call the offices from which these emails emanated and speak to the secretaries in those offices. It is statements Guffey is alleged to have made during those telephone calls which are alleged to violate the Act.

The complaint alleges that during the telephone calls he made on February 19 Guffey threatened employees with discipline if they continued to complain about a terms and condition of employment; threatened employees with discipline if they continued to use the Respondent's email system to engage in protected concerted activities; threatened employees with termination if they repeated his comments; and issued oral warnings to employees for engaging in protected concerted activities.

Cheryl Alves testified that on February 19 Guffey called her office in Dayton, Ohio, and said that he wanted to speak to all of the secretaries on the speaker phone. When they were

[2] Hereinafter, all dates are in 2004.

assembled Guffey, speaking in a loud voice, identified himself and said that it was his decision to send the used monitors to the field offices, that they were still new, and that he would not be questioned about his decision. Guffey said if any more discussion continued on Groupwise he would take further disciplinary action and would begin to throw people out in the streets. He then asked if they wanted the monitors from headquarters or to keep the ones they had. Alves identified herself and said she would keep her old monitor. Guffey told them that if this conversation was repeated to anyone he would fire them and disconnected the call.

Latoya Burch is employed by the Respondent as a secretary in Chicago, Illinois. She testified that on February 19, she and two other secretaries were called into an office and told that Guffey was on the telephone. Guffey said that he understood that there were complaints about the field secretaries getting old monitors from Washington, that it was his decision to do so, and he wanted all the complaining to stop. He said that if it did not stop they would be put out on the streets. She described his tone of voice as "yelling" and "screaming." He then asked if they wanted the monitors from Washington or to keep the ones they had.

Andrea Ashfield is also a secretary in the Chicago office and was present for Guffey's call on February 19. She testified that Guffey started yelling over the telephone that he was aware of the emails going around complaining about the computer monitors, that it was his decision that the field offices would get used monitors, and that if there were any more emails complaining about the used computer monitors, they would be out on the streets.

Cynthia Vallecillo is a secretary in the Respondent's Burlingame, California, office. She testified that on February 19, Guffey called the office and said he wanted all the secretaries on the speakerphone. When all were assembled, Guffey said that he was calling about the complaints about the computer monitors. Guffey asked if Cynthia was present and made a reference to an email she had sent concerning the monitors. He said that the complaints were going to stop or people were going to be fired. He repeated that he did not want to hear any more complaints and asked if they understood. He said that they could choose to keep the monitors they had or the ones he decided to give them, it was his decision and they could "take it or leave it." He said again that if he heard any more complaining about the computer monitors some people will be fired and hung up the phone.

Sue Pearson is a secretary in the Respondent's Bloomington, Minnesota, office. She testified that Guffey called their office on February 19 and said he wanted to speak to all the secretaries on the speakerphone. In a loud angry voice, Guffey identified himself and said that he was tired of hearing about all the griping about the computer monitors "via the emails." He said that he was the boss, that it was his decision and they had no right to second-guess it. Pearson attempted to tell him that they were not second-guessing him but he spoke over her, saying, it was his decision and asked did they want the monitors or not. Guffey asked Pearson who in the IT department had told her the field office were getting new monitors and when she did not respond, questioned her again in a loud voice. After asking which monitors they wanted, Guffey said that they were not to be using the computer to communicate about working conditions or to the Union and, if it continued to happen, they would be disciplined or suspended. He said that this was an official warning that would go into their personnel files and ended the call.

Guffey testified that he was not concerned with the secretaries' use of the Respondent's email system to discuss the monitor issue among themselves and was not even aware of their email exchanges when he made the telephone calls on February 19, with the exception of those in response to Cronk's email on which he was copied. According to Guffey, he did not consider the Respondent's email policy when he made his telephone calls. rather, his concern was the

disrespectful tone of those responses which he felt called Cronk and himself "liars." Guffey testified that when he placed the calls he had his secretary, the union steward at the time Jerry Garfinkel, Cronk, and Human Resources Manager Leah Savall present in his office. In the telephone calls he stated in a loud voice that he was the executive vice president, that he had directed Cronk to send out the email concerning Guffey's decision to use the LCD monitors for the secretaries whose desk space had been reduced, that he did not want them to say he or Cronk were lying, and that he did not want to hear anything more about the subject. When some of the secretaries tried to talk about why they should get the monitors, he told them that was not the purpose of the call. If they tried to argue, he talked over them and told them if they continued to argue he would suspend them. He said the only issue was the truthfulness of Cronk's email, that he did not want to see anything more about it, and that if he did it could lead to discipline up to and including termination. He then asked the employees if they wanted the monitors or if they wanted to keep the ones they had. He denied saying that he would put them on the street, saying, "that's just not me."

Analysis and Conclusions

This is a matter of credibility. The 5 employee witnesses described a number of different telephone calls placed by Guffey on February 19. Not one testified that Guffey said that he felt they had called him and/or Cronk "a liar," that he said that he considered this "disrespectful," "offensive," or "insubordinate," or that he said this alleged insult to his integrity was the purpose of his call. On the contrary, they consistently testified that he told them to stop complaining about not getting the new computer monitors and that, if they continued to send emails complaining about that subject, they would be disciplined. All of these witnesses are current employees of the Respondent and are unlikely to fabricate such testimony. E.g., *Stanford Realty Associates*, 306 NLRB 1061, 1064 (1992); *K-Mart Corp.*, 268 NLRB 246, 250 (1983); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961). I credit their testimony over the uncorroborated, self-serving testimony of Guffey. Cronk, whom Guffey asked to be present during the telephone calls, testified that he came in late and had no recollection of what was said in any of the calls beyond Guffey's saying that it was his decision to provide the used monitors to the field offices, not Cronk's. Likewise, the testimony of former union steward Garfinkel, who was also present during the calls and who testified that he had traveled from Washington, DC, to Dayton at his own expense to appear as a witness for the Respondent, also failed to support Guffey's testimony that the issue he was concerned about was the employees' questioning the truthfulness of Cronk's email about the decision on the monitors. Moreover, Garfinkel had sent an email to Alves on the morning of February 19 in which he said," Mr.Guffey is getting upset about the E-mails going around. Please stop sending the 'Group' E-mails to all the bargaining unit employees." It is also significant that Guffey required all of the secretaries in each of the offices he called to be present for his call, not just those whose emails he claimed to have found offensive. I find that the purpose of Guffey's telephone calls was to threaten the employees with disciplinary action if they continued to use the Respondent's email system to communicate with one another and to complain about their not receiving the new computer monitors, not to discuss or redress any alleged "insubordination."

The next question is whether the employees' email traffic was activity protected by the Act. I find that the purpose of the employees' emails was to express their concerns about getting used computer monitors instead of new ones, as well as, the perception that they, as field employees, were being treated differently than headquarters employees. The controversy that was the subject of the emails related to their conditions of employment, elicited comments and support from one another, and thus constituted concerted activity for the purpose of mutual aid or protection within the meaning of Section 7 of the Act. *Timekeeping Systems, Inc.*, 323 NLRB 244, 247-248 (1997). Their activity directly involved the secretaries' relations with their

employer and directly related to their conditions of employment; accordingly, it was protected by the Act. *NLRB v. Leslie Metal Arts Co.*, 509 F. 2d 811, 813 (6th Cir. 1975). I also find that none of the language used in the employees' emails was so opprobrious or egregious as to render them unfit for further service, which it must be in order to lose the protection of the Act. E.g., *Timekeeping Systems, Inc.*; *Wolkerstorfer Co.*, 305 NLRB 592 fn. 2 (1991); *Dreis & Krump Mfg. Co. v. NLRB*, 544 F. 2d 320, 329 (7th Cir. 1976).

The complaint alleges that the employees were disciplined when they were issued oral warnings by the Respondent. I credit the testimony of Pearson that in his call to her office Guffey told the secretaries that he was issuing them "an official warning" that would go into their personnel files. Although no written record of such warnings was produced at the hearing, I find it unlikely that Pearson would have fabricated such a comment. It is more likely that Guffey either failed to follow up on his statement about the warnings or simply did not document them. In any event, he made it clear that continued email traffic, similar to what which prompted his telephone calls, could result in further disciplinary action. Having found that these warnings arose out of activity protected by the Act, a *Wright Line*[3] analysis is appropriate. *Timekeeping Systems, Inc.*, supra.[4]

The General Counsel has established that the field secretaries had engaged in concerted activity protected by the Act, that the Respondent was aware of that activity, and that it issued them warnings and threatened that, if such protected activity continued, they would be subject to additional disciplinary action. Consequently, under *Wright Line,* the burden shifted to the Respondent to establish that it would have taken the same actions even in the absence of protected activity on the field secretaries' part. The Respondent introduced evidence that it has had a long-standing policy which states that employees' use of its email system for personal messages should be "very limited." In its post-hearing brief, it states that the e-mails at issue were unprotected because "they violated the Employer's valid policy limiting the use of the e-mail system." The Respondent called as witnesses, two of its current employees who had formerly served as union stewards, Garfinkel and Geraldine Crump. They testified that in their opinions the field secretaries emails were excessive and/or an abuse of the email system. There is no evidence that either had shared his or her opinion with Guffey before he made his telephone calls. I find this evidence irrelevant because, in his testimony, Guffey expressly denied that he was concerned about an alleged violation of the email policy when he made his telephone calls to the field secretaries. He stated: "Actually the email policy really didn't come into play at all for my phone call purposes. I, you know, I just thought, I looked at the email and I could see it was offensive." While acknowledging this testimony, the Respondent still contends that Guffey had the right to try "to dampen the volume of e-mail complaints about the monitors" because the employees' emails on the subject "violated the APWU's lawful policy limiting personal use of e-mails." I find the Respondent's reliance on this argument amounts to a shifting defense which further undermines its case. *United States Service Industries*, 324 NLRB 834, 837 (1997).[5]

As discussed above, the Respondent's principal defense is that Guffey's telephone calls, warnings, and threats were not about the emails the field secretaries' sent back and forth

---

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v.Transportation Management Corp.*, 462 U.S. 393 (1983).

[4] Whether there were actual warnings or merely threats that similar activity occurred in the future the employees would be disciplined, the Respondent's defenses are the same.

[5] Since the Respondent's email policy did not serve as the basis for the disciplinary action involved here, there is no issue as to whether it was disparately enforced.

among themselves complaining about the used computer monitors they were being given. Rather, it claims he was reacting to what he considered insubordinate comments in their emails which allegedly questioned his and Cronk's veracity and integrity. I have discredited that testimony which strikes me as an after-the-fact attempt to recast his coercive and unlawful remarks. I find that the Respondent has not established that it would have taken the same actions in the absence of the employees' protected activity. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by issuing oral warnings to the secretaries in its Bloomington field office and by threatening to discipline the secretaries in the Bloomington, Dayton, Chicago, and Burlingame field offices, if they continued to engage in protected activity.

In his brief, counsel for the General Counsel argues that the Respondent violated Section 8(a)(1) by coercively interrogating Pearson during the telephone call to her office on February 19. There was no allegation concerning this in the complaint which was not amended at the hearing. This issue was not fully litigated and I make no findings concerning it.

Conclusions of Law

1. The Respondent, American Postal Workers Union, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act on February 19, 2004, by issuing oral warnings to the secretaries in its Bloomington, Minnesota, field office and threatening the secretaries in its Bloomington, Minnesota, Dayton, Ohio, Chicago, Illinois, and Burlingame, California, field offices with disciplinary action for engaging in concerted activities protected by Section 7 of the Act.

3. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER[6]

The Respondent, American Postal Workers Union, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing disciplinary warnings to and threatening to take disciplinary action

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

against its employees for engaging in concerted activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful warnings issued to the secretaries in its Bloomington, Minnesota, field office or any other office to whom similar warnings may have been issued and within 3 days thereafter notify the employees in writing that this has been done and that the warnings will not be used against them in any way.

(b) Within 14 days after service by the Region, post at its headquarters office in Washington, DC, and in its 5 regional offices and 18 national business agent offices located throughout the United States, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the offices referred to herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 19, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 31, 2006

_____
Richard A. Scully
Administrative Law Judge

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

JD–64–06
Washington, DC

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT issue warnings or threaten our employees with disciplinary action because they engage in concerted activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful warnings issued to the secretaries in our Bloomington, Minnesota, office and any other office to whom such warnings were issued and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the warnings will not be used against them in any way.

AMERICAN POSTAL WORKERS UNION
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

550 Main Street, Federal Office Building, Room 3003
Cincinnati, Ohio 45202-3271
Hours: 8:30 a.m. to 5 p.m.
513-684-3686.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 513-684-3750.